Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1583

FRANCES MORRIS, *et al.*,
Appellants,

v.

L. MARION GRESSETTE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

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DOCKETED APRIL 28, 1976
PROBABLE JURISDICTION NOTED DECEMBER 6, 1976

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 7, 1975 —Plaintiff Morris' complaint filed in United States District Court for the District of South Carolina, Charleston Division.

Nov. 19, 1975 —Designation of three-judge court.

Nov. 28, 1975 —Defendants' answer filed.

Dec. 4, 1975 —Pre-Trial Conference

Jan. 26, 1976 —Plaintiffs' brief filed.

Jan. 26, 1976 —Defendants' brief filed.

Jan. 26, 1976 —Stipulations of facts filed.

Jan. 28, 1976 —Amicus memorandum of the United States filed.

Jan. 28, 1976 —Oral arguments held.

Jan. 29, 1976 —Letter from Mr. Derfner to Judges Haynsworth, Russell and Hemphill.

Jan. 29, 1976 —Defendants' post-hearing memorandum of law.

March 12, 1976—Order of three-judge court dismissing plaintiffs' complaint.

March 22, 1976—Plaintiffs' motion to alter or amend judgment.

March 22, 1976—Plaintiffs' motion to supplement record.

March 22, 1976—Plaintiffs' motion for injunction pending consideration of rule 59 motion and pending appeal.

March 30, 1976—Order denying plaintiffs' motions to supplement record, to alter or amend judgment and for injunction pending consideration of rule 59 motion and pending appeal.

April 16, 1976 —Plaintiffs' notice of appeal filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 75-1998

FRANCES MORRIS AND MAXINE WOODS,
Plaintiffs,

—vs—

L. MARION GRESSETTE, President Pro Tem of the South Carolina Senate; JAMES B. EDWARDS, Governor of South Carolina; DANIEL R. MCLEOD, Attorney General of South Carolina; BRANTLEY HARVEY, JR., Lieutenant Governor of South Carolina; LOVICK O. THOMAS, Clerk of the South Carolina Senate; O. FRANK THORNTON, Secretary of State of South Carolina; JAMES ELLISOR, Executive Director of the South Carolina State Election Commission; G. P. CALLISON, Chairman, South Carolina State Election Commission; MARGARET TOWNSEND, MARTHA CHAPMAN, EDGAR L. MORRIS, and RUBEN GRAY, Members, South Carolina State Election Commission,

Defendants.

PLAINTIFFS' COMPLAINT

Filed Nov. 7, 1975

1. This is a complaint pursuant to section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, for declaratory and injunctive relief against the enforcement of Act 1205, Acts of the South Carolina General Assembly of 1972.

2. Jurisdiction arises under 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1973c. The matter in controversy,

exclusive of interest and costs, exceeds the value of $10,000.00.

3. Plaintiffs Frances Morris and Maxine Woods are citizens of the United States and residents and qualified electors of Charleston County, South Carolina. Each is Black.

4. Each plaintiff sues in her own behalf, and, pursuant to Rule 23(b)(2), Fed. R. Civ. P., on behalf of all others similarly situated. The class includes all qualified electors of South Carolina, particularly all Black qualified electors. The class is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the class. Plaintiffs' claims are typical of the claims of the class, and plaintiffs will fairly and adequately represent the interests of the class. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

5. Defendant Gressette is a member of the South Carolina Senate and is President Pro Tem of that legislative body; Defendant Edwards is the Governor of the State of South Carolina and in his capacity as Governor of the State of South Carolina is charged with the execution and enforcement of the Constitution and Laws of the State of South Carolina, including all laws pertaining to elections; Defendant Harvey is the Lieutenant Governor of the State of South Carolina and President of the South Carolina Senate and, as such, is the presiding officer of that legislative body; Defendant Thomas is the Clerk of the South Carolina Senate and is charged with the preparation of calendars, journals and other records of the Senate which list matters of pending business and reflect action taken on all legislative items before that body; Defendants Callison, Townsend, Chapman, Morris and Gray are members of and constitute

the South Carolina State Election Commission and, as such, are charged with general administration of elections for State Senate and other state offices; Defendant Ellisor is Executive Director of the South Carolina Election Commission and as such is responsible for the actual administration of the responsibilities vested in the South Carolina Election Commission; Defendant McLeod is Attorney General of the State of South Carolina and chief law officer of the State of South Carolina, and is responsible under 42 U.S.C. § 1973c for seeking and obtaining authority to enforce voting changes (such as Act 1205) which are covered by that section; Defendant Thornton is Secretary of State of South Carolina, is custodian of the Acts of the General Assembly and is also responsible for preparing, signing, recording and issuing commissions of office including those for the office of State Senate.

6. Defendant Gressette is sued in his own behalf and, pursuant to Rule 23(b)(2), Fed. R. Civ. P., on behalf of the class of all members of the South Carolina Senate. The class is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the members of the class. Defendants' claims are typical of the claims of the class, and defendants will fairly and adequately represent the interests of the class. Plaintiffs have acted on grounds generally applicable to the defendant class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

7. Each defendant and member of the defendant class is sued in his individual and official capacities.

8. Each defendant and member of the defendant class has, at all times relevant herein, acted and threatened to act under color of law.

9. The State of South Carolina is a covered jurisdiction pursuant to 42 U.S.C. §§ 1973b and 1973c. 30 Fed. Reg. 9897 (August 7, 1965).

10. On May 6, 1972, the State of South Carolina adopted Act 1205, Acts of the General Assembly of 1972, reapportioning the South Carolina Senate.

11. Act 1205 constitutes a "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964."

12. The State of South Carolina has not gained authority to enforce Act 1205 in the manner required by 42 U.S.C. § 1973c. *Harper* v. *Levi*, 520 F. 2d 53 (D.C. Cir. 1975).

13. South Carolina's failure to gain authority pursuant to 42 U.S.C. § 1973c for enforcement of Act 1205 renders that act ineffective as law and unenforceable.

14. Notwithstanding the unenforceability of Act 1205, the defendants intend to enforce that Act at statewide elections to be held in 1976, and to conduct elections for, and authorize the seating of, members of the South Carolina Senate according to the provisions of Act 1205.

15. On information and belief, members of the defendant class have decided and announced that they will enforce Act 1205 and will not comply with 42 U.S.C. § 1973c unless ordered by this Court.

16. The enforcement of Act 1205 will violate the rights of plaintiffs and members of their class as guaranteed by the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*

17. Plaintiffs have no adequate remedy at law for this violation of their rights. Unless this Court enjoins enforcement of Act 1205, plaintiffs will suffer irreparable injury to their precious right to vote.

WHEREFORE, plaintiffs pray that this Court grant the following relief:

a. Order that a three-judge court be convened, pursuant to 42 U.S.C. § 1973c.

b. Certify the plaintiff and defendant classes pursuant to Rule 23(b) (2), Fed. R. Civ. P.

c. Grant a permanent injunction against the enforcement of Act 1205.

d. Enjoin the conduct of any elections or preparation for elections for the South Carolina Senate pursuant to Act 1205 or any other reapportionment plan which has not been lawfully cleared pursuant to 42 U.S.C. § 1973c.

e. Declare that this Court will itself devise an interim plan for the conduct of the 1976 elections and for the seating of Senators for terms of such length as may be deemed equitable, if (1) by January 31, 1976, the appropriate defendants have not submitted a new reapportionment plan for clearance pursuant to 42 U.S.C. § 1973c, or if (2) by March 31, 1976, clearance pursuant to 42 U.S.C. § 1973c has not been obtained for a new reapportionment plan.

f. Award the plaintiffs their costs of suit and reasonable attorneys' fees.

g. Grant such other and further relief as may be appropriate.

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By: /s/ ARMAND DERFNER

PAUL R. DIMOND
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520 Woodward Building
Washington, D.C. 20005

TRUE COPY
TEST:

MILLER C. FOSTER, JR.
Clerk

/s/ CHARLOTTE LIENLOPHER
By: Deputy Clerk

Charleston, S.C.
November 6, 1975

[Certificate of Service Omitted in Printing]

DEFENDANTS' ANSWER

Filed Nov. 28, 1975

[Caption Omitted in Printing]

Come now the Defendants in the above-styled action and in answer to the Complaint herein do say and allege:

IN ANSWER TO THE COMPLAINT AND AS A FIRST DEFENSE

1. Defendants admit the allegations of Paragraph 1 of the Complaint insofar as those allegations merely state the purpose of Plaintiffs in instituting this action.

2. Defendants admit only so much of Paragraph 2 of the Complaint as alleges that jurisdiction arises under 28 U.S.C. § 1343 and 42 U.S.C. § 1973c. Defendants deny the remaining allegations of Paragraph 2. Defendants further allege that this action is proper for determination by a three judge court as required by 28 U.S.C. § 2281 and 42 U.S.C. § 1973c and that declaratory judgment is appropriate under 28 U.S.C. § 2201.

3. Defendants, being without sufficient knowledge or information as to the allegations of Paragraph 3 of the Complaint, deny the same.

4. Defendants deny the allegations of Paragraph 4 of the Complaint.

5. Defendants admit the allegations of Paragraph 5 of the Complaint except that statement alleging the defendant Morris to be a member of the South Carolina State Election Commission as the defendant Morris is no longer a member of the Commission and has been replaced by Raymond A. Harris.

6. Defendants admit the allegations of Paragraph 6 of the Complaint.

7. Defendants admit only so much of Paragraph 7 of the Complaint as alleges that each defendant and member of the defendant class is sued in his official capacity.

8. Defendants admit only so much of Paragraph 8 of the Complaint as alleges that each defendant and member of the defendant class has, at all time relevant herein, acted under color of state law. Defendants deny the remaining allegations of Paragraph 8.

9. Defendants admit the allegations of Paragraphs 9, 10 and 11 of the Complaint.

10. Defendants deny the allegations of Paragraphs 12 and 13 of the Complaint. Defendants further alleged in answer to Paragraphs 12 and 13 of the Complaint that by letter of June 30, 1972, from David L. Norman, Assistant Attorney General, Civil Rights Division, to Honorable Daniel R. McLeod, Attorney General, State of South Carolina, the United States Attorney General stated: ". . . we enter no objection to the implementation of Plan A of Act 1205." This decision to enter no objection to Plan A of Act 1205 was lawful, valid, and within the scope of the authority vested in the United States Attorney General by 42 U.S.C. § 1973c and constitutes authority under which the State of South Carolina and the Defendants may enforce Plan A of Act 1205 of 1972.

11. Defendants admit only so much of Paragraph 14 of the Complaint as alleges that the defendants intend to enforce Act 1205 of 1972 at statewide elections to be held in 1976 and to conduct elections for, and authorize the seating of, members of the South Carolina Senate according to the provision of Act 1205. Defendants deny the remaining allegations of Paragraph 14.

12. Defendants deny the allegations of Paragraphs 15, 16 and 17 of the Complaint.

13. All allegations of the Complaint not hereinabove expressly admitted are hereby denied.

AS A SECOND DEFENSE

14. Defendants reallege and incorporate in this defense, as if fully set out herein, the allegations of Paragraphs 1 through 13 above.

15. By letter of May 9, 1972, from Hardwick Stuart, Jr., Assistant Attorney General, to Assistant Attorney General, Civil Rights Division, the Defendant McLeod, as chief legal officer of the State of South Carolina submitted Act 1205 of 1972 to the United States Attorney General pursuant to 42 U.S.C. § 1973c.

16. On May 17, 1972, the United States Attorney General gave official notice that the submission of Act 1205 of 1972 had been received on May 12, 1972, and that the Attorney General had 60 days from May 12, 1972, in which to respond to the submission.

17. July 11, 1972, was the sixtieth calendar day after May 12, 1972.

18. The United States Attorney General did not, on or before July 11, 1972, interpose an objection to the enforcement of Section 2 of the Act 1205 of 1972.

19. Pursuant to 42 U.S.C. § 1973c, Section 2 of the Act 1205 of 1972 may be enforced by the State of South Carolina and the Defendants, because Act 1205 has been submitted to the United States Attorney General and he has not interposed an objection to Section 2 of Act 1205 within 60 days after such submission.

AS A THIRD DEFENSE

20. Defendants reallege and incorporate in this defense, as if fully set out herein, the allegations of Paragraphs 1 through 19 above.

21. In the case of *McCollum, et al.* v. *West, etc., et al.*, Civil Action No. 71-1211, Plan A of Act 1205 of 1972 was considered and approved by a three-judge panel of this Court, acting within its lawful jurisdiction, on May 23, 1972, the Court finding specifically that Plan A "complies with the requirements of the Constitution of the United States, and it is therefore approved." The *McCollum* plaintiffs claimed that multimember districts and numbered seats for the election of the South Carolina Senate had the effect of denying or abridging the right of qualified black citizens to vote on account of their race, a claim that was decided adversely to the *McCollum* plaintiffs by this Court.

22. 42 U.S.C. § 1973c neither requires nor permits the United States Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction that a legislative reapportionment plan does not deny or abridge the right of qualified black citizens to vote on account of their race.

23. Pursuant to the determination of this Court in *McCollum* v. *West* that Plan A of Act 1205 complies with the requirements of the Constitution of the United States, the State of South Carolina and the Defendants may enforce Plan A of Act 1205.

WHEREFORE, having fully answered the Complaint herein, the Defendants, and each of them, pray the Court:

(1) To enter judgment declaring that the Defendants may lawfully continue to enforce Plan A of Act 1205 of 1972 and denying the Plaintiffs the relief sought in the Complaint; and

(2) To award the Defendants the costs of this action and reasonable attorneys' fees.

DANIEL R. MCLEOD
Attorney General

TREVA G. ASHWORTH
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

RANDALL T. BELL
University of South Carolina
Law Center
Columbia, South Carolina 29208

BY: /s/ DANIEL R. MCLEOD
Attorneys for the Defendants

Columbia, South Carolina
November 28, 1975.

[Certificate of Service Omitted in Printing]

EXCERPTS FROM PRE-TRIAL CONFERENCE

Held December 4, 1975

[Caption Omitted in Printing]

[1] A formal conference was called in the above entitled case on the 4th day of December, 1975, in the United States District Court, Columbia, South Carolina.

BEFORE: HON. J. ROBERT MARTIN, JR., Presiding, Chief United States District Judge, For the State of South Carolina.

Appearances:

ARMAND DERFNER, Esq., appearing in behalf of the Plaintiff.

RANDALL T. BELL, Esq., appearing in behalf of the defendants.

E. Jackie Cole,
Official Court Reporter

[2] THE COURT: I see it now, okay. All right, Gentlemen, that clears us down to what I would rather do first in talking with the two members of the Court, is that you give me your ideas from the standpoint of the relevant issues. By that is meant this, this matter has previously been before this same Court, as it is presently constituted in a previous action, when was it? Two years ago?

MR. BELL: Yes, it has been there, your Honor.

THE COURT: What the first thing that—we have conferred over the telephone—that entered all of our minds is this, what if anything legally or factually has changed in this matter as it presently is other than it was from a record standpoint as it was before us previously.

MR. DERFNER: Your Honor, if you want me to respond. . .

[3] THE COURT: I don't want any detail. What I'm wanting to do is to explore it from the standpoint of our determining what record we want, if it is necessity of further record.

MR. DERFNER: Our impression, we may be able to do even better than the Court may have expected. I know my impressions, and I think in general Mr. Bell and I are in accord, that we not only don't need much record, if any, but we don't need the old record. In other words, the issues in this case are principally legal, having to do with whether the objection letter of the Justice Department counters or doesn't counter is basically what it boils down to. For one thing, none of the underlying questions of single versus multi district...

THE COURT: That's exactly what we driving at.

MR. DERFNER: We don't think any of that is really in the case directly at this point. In fact, I think we both think at least as to the issues of liability, that is whether the Senate does or does not have to be reapportioned, we can pretty much move for cross motion of summary judgment. There are a couple of depositions scheduled...

THE COURT: I notice that in the file.

MR. DERFNER: They, and some other conferences between us will probably nail down the few facts. I think we'll essentially have on the question of liability what amounts to almost a stipulated set of facts.

[4] MR. BELL: I think we're in accord with that, your Honor. I think it is agreed that neither set of parties has any interest in delaying this litigation. We want to move forward with it as quickly as possible. I would like to say a couple of things. First of all, we agree with Mr. Derfner that the question here is not multi-member districts versus single-member districts. In fact, the issues which were litigated on the merits before the Court three years ago simply are not present in this case. Certainly the defendants would take the

position that there has been no change in either the law [5] or the facts.

THE COURT: Well, that was primarily...

MR. BELL: We feel the plan is just as enforcible now as it was three years ago when he had it up. I would say that on the question of relief, I think that it is not going to be a simple matter. It will be very complex matter, but...

THE COURT: Well, that's a bridge we would have to cross.

DEFENDANTS' EXHIBIT NO. 1

Complaint in *Harper* v. *Kleindienst*, C.A. No. 1607-72 (D.D.C.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1607-72

JOHN ROY HARPER, II
1125½ Washington Street
Columbia, S.C. 29202

and

VICTORIA DELEE
Route 2
Box 142
Ridgeville, S.C. 29472,

Plaintiffs,

—vs—

RICHARD KLEINDIENST,
Attorney General of the
United States
United States Department
of Justice
Washington, D.C. 20530

DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division
United States Department
of Justice
Washington, D.C. 20530,

Defendants.

COMPLAINT

1. This is an action for review of a decision by defendants unlawfully refusing to object to certain changes

in the election procedures of the State of South Carolina, which were submitted to the defendants under the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. That statute obligates the defendants to object to a submitted voting change unless there is proof that the change does not have a racially discriminatory purpose or effect. Plaintiffs seek (1) a declaratory judgment that defendants' refusal to object was unlawful and (2) injunctive relief compelling them properly to perform their duty under Section 5. The defendants' violation of their statutory duty in this case abridged plaintiffs' right to be free from racial discrimination or dilution in voting.

2. The particular change in South Carolina's law submitted to the defendants provides for the substitution of multi-member State Senate districts for certain districts which had been single member, with the provision for numbered seats within the multi-member districts, and the requirement of a majority vote to win election.

PARTIES

3. Each of the individual plaintiffs is a citizen of the United States and a resident and registered voter of the State of South Carolina. Each is black. Their names and counties of residence are as follows: John Roy Harper, II (Richland County); and Victoria DeLee (Dorchester County). Each of these counties is within a multi-member Senate district under Act 1205.

4. Each plaintiff sues in his own behalf, and, pursuant to Rule 23(b)(2), Fed. Rules Civ. Proc., on behalf of all those similarly situated, including particularly all black residents of the counties included in multi-member districts. The class is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the members of the class. Plain-

tiffs' claims are typical of the claims of the class, and plaintiffs will fairly and adequately represent the interests of the class. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making final relief appropriate with respect to the class as a whole.

5. Defendant Richard Kleindienst is the Attorney General of the United States of America, under Section 5 of the Voting Rights Act, is the official designated to receive and act on voting changes submitted under that Section. Defendant David L. Norman is an Assistant Attorney General of the United States of America, in charge of the Civil Rights Division of the United States Department of Justice and is the person to whom defendant Kleindienst has delegated general responsibility for administering Section 5, including the functions of deciding whether or not to object to submitted changes, and of signing letters announcing objections and non-objections under Section 5. Each defendant is sued in his official capacity.

JURISDICTION

6. The actions of the defendants hereinafter alleged constitute final agency action within the meaning of Section 10 of the Administrative Procedure Act and constitute a failure of the Attorney General of the United States to perform a duty owed to the plaintiffs and the class they represent. Plaintiffs have exhausted all administrative remedies. This Court has jurisdiction of this action under 5 U.S.C. §§ 701-706, and 28 U.S.C. §§ 1331, 1361 and 2201.

OPERATION OF SECTION 5 OF THE VOTING RIGHTS ACT

7. The State of South Carolina is covered under Section 5 of the Voting Rights Act. 30 Fed. Reg. 9897 (Aug. 7, 1965).

8. A state or political subdivision covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, may not lawfully enforce a "voting prerequisite or qualification, or standard, practice or procedure different from that in force or effect on November 1, 1964" [hereinafter referred to as a "voting change"] unless it either obtains a declaratory judgment from the United States District Court for the District of Columbia that the submitted law "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or unless the voting change "has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission."

9. The Attorney General's regulations concerning his decision whether or not to object to a voting change read, in pertinent part, as follows:

> "Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has

a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable to the District Court, enter an objection and so notify the submitting authority." 28 C.F.R. § 51.19.

SOUTH CAROLINA'S VOTING CHANGE— ACT NO. 932

10. On November 9, 1971, the Governor of South Carolina signed into law Act No. 932, referred to as the "Reapportionment Act of 1971" which created alternate plans for the reapportionment of the Senate of South Carolina. Act 932 provided for the establishment, for the first time in South Carolina, of many multi-member Senate districts, and provided for a "numbered post" system (*i.e.*, the designation of each office as a separate numbered office).

11. On November 11, 1971 the Attorney General of South Carolina, pursuant to a resolution of the General Assembly, brought a declaratory judgment action to test the constitutionality of the reapportionment schemes of Act 932 under the Fourteenth Amendment.

12. On December 7, 1971, plaintiff Harper and others brought an action attacking Act 932 on the grounds, *inter alia*, that it violated the Fourteenth and Fifteenth Amendments and Section 5 of the Voting Rights Act [hereinafter referred to as Section 5], 42 U.S.C. § 1973c.

13. During the pendency of the above lawsuits, the State of South Carolina submitted Act 932 to the Attorney General for his review, pursuant to Section 5 of the Voting Rights Act. The Attorney General performed his statutory duty, and by letter of March 6, 1972, interposed his objection to the enforcement of Act 932. (A copy of the Attorney General's letter of March 6, 1972 is annexed hereto as Exhibit No. 1.) In so doing he stated:

> "Our analysis of recent federal court decisions dealing with issues of this nature, and to which we feel obligated to give great weight, leaves us unable to conclude, with respect to these plans, that the combination of multi-member districts, numbered posts, and a majority (run-off) requirement would not occasion an abridgement of minority voting rights in South Carolina."

14. On April 7, 1972, after a trial of the claims in the above lawsuits, the South Carolina three judge District Court issued its opinion which invalidated Act 932 as unconstitutional under the Fourteenth Amendment, but sustained the statute against the Fifteenth Amendment challenge. The Court noted its lack of jurisdiction to decide the issues raised by plaintiffs' cause of action under the Voting Rights Act, and expressly declined to rule thereon. The Court ordered South Carolina to enact equitable reapportionment legislation and to submit its new enactment for the Court's review. *Twiggs* v. *West*, Civ. No. 71-1106 (D.C.S.C., April 7, 1972). A copy of that opinion is annexed hereto as Exhibit No. 2.

SOUTH CAROLINA'S VOTING CHANGE— ACT NO. 1205

15. On May 6, 1972 the Governor of South Carolina signed into law Act No. 1205 which created alternate plans for the reapportionment of the State Senate. The apportionment scheme of Act 1205 differs from that proposed by Act 932 in creating a more even distribution of voting population among districts, but retains the characteristics found objectionable by the Attorney Gen-

eral in his March 6, 1972 determination: In particular, Plan A of Act 1205 creates even more multi-member districts than the earlier Act and establishes a "numbered post" system for these districts. A copy of Act 1205 is annexed hereto as Exhibit No. 3.

16. South Carolina submitted Act 1205 to the South Carolina District Court which, without further proceedings, issued an order finding Plan A of Act 1205 to be constitutional. *Twiggs* v. *West*, Civ. No. 71-1106 (D.C. S.C., May 23, 1972).

17. The Plaintiffs and those persons for whom this action is brought constitute a cognizable racial minority large enough and, in most cases, concentrated enough to be able to elect or participate in the elections of candidates of their choice provided the districts are fairly drawn. The creation of multi-member senatorial districts, however, with senators elected at large, operates to dilute and cancel out the voting strength of plaintiffs and their class. The above-mentioned diluting effect is aggravated by ancillary provisions of Act 1205 such as the use of the "numbered post" system which further tends to impair the ability of plaintiffs and members of their class to cast effective ballots.

SUBMISSION OF ACT 1205 TO THE ATTORNEY GENERAL

18. The changes alleged in paragraph 15 are voting changes which cannot be enforced without Section 5 clearance.

19. The State of South Carolina initially submitted Act 1205 to the Attorney General on May 12, 1972, and requested expedited consideration of its submission. Defendant Norman requested additional materials and information from the State, and by letter dated June 19, 1972 notified South Carolina that its submission was

complete. Pursuant to that letter and the defendants' regulations, 28 C.F.R. § 51.18(a), the sixty-day period under Section 5 commenced on June 19, 1972 and will terminate on August 17, 1972.

20. On June 30, 1972 defendant Norman issued a letter objecting to Section 3 of Act 1205 which Section established numbered seating in the State House of Representatives, but refusing to interpose an objection to Plan A of Act 1205 relating to the State Senate. Defendant Norman stated as the basis for such refusal that he was "constrained to defer to the . . . determination of the three-judge District Court", although no determination had been made by said Court of rights under the Voting Rights Act. A copy of that letter is annexed hereto as Exhibit No. 5.

21. Defendant Norman failed to make the determinations required under Section 5 of the Voting Rights Act and under the Attorney General's regulations as to whether Plan A of Act 1205 has the purpose or effect of denying or abridging the right to vote on account of race or color.

22. The defendants' failure to make the determinations described in paragraph 21 and the purported reliance of defendant Norman on a nondispositive determination of a district court in South Carolina described in paragraph 20 violated defendants' obligation under the Voting Rights Act, 42 U.S.C. § 1973c, the regulations, 28 C.F.R. § 51.19 and the principles established by their prior rulings.

INJURY

23. The plaintiffs and all members of their class will suffer irreparable and continuing injury if this Court does not grant relief. Upcoming primary elections, final elections in November, 1972 and future elections thereafter will be held for the State Senate, in accordance

with the provisions of Act 1205, which elections will abridge and deny plaintiffs' right to vote on account of race. Unless this Court grants relief, plaintiffs and all members of their class will have no opportunity to obtain administrative review of Act 1205 under the Voting Rights Act which places the burden of proof upon a state seeking approval of a change in its voting procedures.

RELIEF

24. WHEREFORE, plaintiffs pray that the Court:

(1) advance this cause on the docket;

(2) declare that the action of defendant Norman of June 30, 1972 described in paragraph 20, which action was taken pursuant to delegation of authority from defendant Kleindienst, is unlawful and void;

(3) direct the defendants to reach an independent determination pursuant to Section 5 and to report such determination to the Court for such further proceedings as the Court may require; and to require defendants to notify the State of South Carolina that they object to Plan A of Act 1205 and to maintain such an objection in force until further order of the Court; and

(4) award plaintiffs such other relief as the Court may deem equitable.

August 10, 1972

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[Exhibit to Complaint Omitted]

DEFENDANTS' EXHIBIT NO. 11

Letter of March 6, 1972 from David L. Norman to Daniel R. McLeod

Department of Justice
Washington, D.C. 20530

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Mr. Attorney General:

This is in reference to the redistricting plans for South Carolina State Senate Districts (Act No. 932) submitted by your office pursuant to Section 5 of the Voting Rights Act of 1965 and received by this Department on November 22, 1971. Supporting information necessary to make the submission complete was received by this Department on January 5, 1972. Thus, under departmental guidelines, the Attorney General's response is due on March 6, 1972.

We have given careful consideration to the submitted districting plans (Plan A and Plan B) and the supporting information, as well as to information received from other sources. Insofar as time limitations have allowed, we have studied both plans in detail. As a result, however, we are unable to conclude, as we must under the Voting Rights Act, that either proposed Plan A or Plan B will not have the effect of abridging the right of black citizens of South Carolina to vote on account of race or color.

A careful analysis and review of the demographic facts involved and recent court decisions identify several significant areas of concern. Twelve of the 23 proposed districts under Plan A and 14 of the 20 districts in Plan B

are multi-member. We note that in these districts candidates must run for numbered posts. It is our understanding also that South Carolina law requires a majority of votes to win primary elections. A substantial number of the multi-member districts in each plan have significant concentrations of black population.

Our analysis of recent federal court decisions dealing with issues of this nature, and to which we feel obligated to give great weight, leaves us unable to conclude, with respect to these plans, that the combination of multi-member districts, numbered posts, and a majority (run-off) requirement would not occasion an abridgement of minority voting rights in South Carolina. The reasoning of these recent cases is illustrated by the decision of the federal district court in North Carolina which commented with respect to numbered posts in multi-member districts, "It is clear that the numbered seat law may have the effect of curtailing minority voting power." (*Scott* v. *Dunston*, N.D.N.C. No. 2666-Civil, Slip Opinion, n. 9 at p. 17, (Jan. 10, 1972)). Similarly, the three-judge court considering the Texas legislative reapportionment found both the majority run-off and the numerical post requirement tended to abridge minority voting power and "highlight the racial element where it does exist." *Graves* v. *Barnes*, W.D. Tex., No. A-17-CA-142, Slip Op. at p. 38. See, also, *Sims, Farr, and U.S.A.* v. *Amos*, No. 1744-N, (M.D. Ala., January 3, 1972); *Bussie* v. *The Governor of Louisiana*, No. 71-202 E.D. La., August 24, 1971). And the Supreme Court, while not holding multi-member districts unconstitutional, *per se*, has recognized the potentially discriminatory effect such districts can have by submerging a cognizable racial minority into a majority white district. See *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971).

For the foregoing reasons, I must on behalf of the Attorney General interpose an objection to changes sub-

mitted by these reapportionment plans. We have reached this conclusion reluctantly because we fully understand the complexities facing any state in designing a reapportionment plan to satisfy the needs of the state and its citizens, and, simultaneously, to comply with the mandates of the Federal Constitution and laws. We are persuaded, however, that the Voting Rights Act compels this result. However, nothing contained herein should be construed in any way as addressing the Fourteenth Amendment issues involved, which I understand are pending before the Court.

Of course, Section 5 permits seeking approval of all changes affecting voting by the United States District Court for the District of Columbia irrespective of whether the changes have previously been submitted to the Attorney General.

Inasmuch as the United States District Court for the District of South Carolina has deferred proceedings in pending cases involving this reapportionment plan until the Attorney General completed his review, I am taking the liberty of furnishing a copy of this letter to the Court.

Sincerely,

/s/ David L. Norman
DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

EXCERPTS FROM DEPOSITIONS

Deposition of Gerald W. Jones

DIRECT EXAMINATION

* * * *

BY MR. BELL:

[4] Q And how long have you held that position?
A Since that section was created in 1969.
Q Mr. Jones, what is your present position of employment, please?
A My position is Chief of the Voting Section, Civil Rights Division, Department of Justice, United States Department of Justice.

* * * *

[10] Q Did you participate in the hearings that were conducted by the Oversight Committee of the House Judiciary Committee in 1971 concerning the enforcement of the Voting Rights Act; specifically, Section 5?
A Well, I was there.
Q You were present during the hearings?
A That's right.
Q And you have no recollection that a question was raised as to the burden of proof under Section 5 submissions?
A Oh, I am sure that a question was raised.
Q And you have no recollection that the Department of Justice indicated that initially its position was that the department would have to look at the evidence accompanying a submission and would only object if it found evidence that the change which was being submitted in fact had a discriminatory effect?
[11] A I can't honestly say that that is my present recollection.
Q And you have no recollection of the department taking that position as far as particular submissions that

were made under Section 5 prior to the promulgation of the 1971 procedures?

A Well, the one that readily comes to mind is the Mississippi open primary submission. That was the position taken by the department with respect to that submission.

Q By "position," you mean that the department would have to find the change—

A The position was that the department couldn't conclude that the change was discriminatory, therefore we would not object.

• • • •

[13] A Well, I am not sure that there was any standard that you could articulate that was being used during that period of the enforcement of Section 5.

The standard that was applied in the Mississippi open primary case would seem to be obvious from the reasoning in the decision itself. I would not be able to say that any particular given standard was used at that time. As a matter of fact, that was one of the reasons for—that led up to the creation of the administrative procedure, so that there would be articulated consistent procedures that would govern the administration of the Section 5 evaluation process.

Q Are you saying there were no standards used at the time, that the department itself had no standards that it applied consistently and uniformly?

A None that I was aware of, except to the extent of making a judgment as to whether or not the change had the potential of racial discrimination.

• • • •

[16] Q Prior to the effective date of the present Section 5 submission procedures, was there any particular type of data the department required submitting authorities to send along with submissions.

A As far as I can recall, it was strictly an ad hoc thing, that whoever was reviewing a particular submis-

sion used his own judgment as to what information he would need and sought to get it.

No, no rules at all that I am aware of.

• • • •

[21] Q Would there be cases involving routine matters such as changing from paper ballots to voting machines, and things of this sort, in which you would not solicit comments from these types of parties?

A No. Those kinds of changes we very much seek comments on, because those are of particularly local application, and the input of the affected electorate is most significant to us on those kinds of changes.

Q So it would have been a general policy to solicit these comments—

A That's right.

Q —regardless of the type of submission?

A Exactly.

Q But you stated that you can't say for certain that it was done in the case of every submission?

A Well, that's right.

• • • •

[24] Q Now, in saying that there are no documents other than that one document, do you mean to say that in no other case except that one case did the Attorney General defer to a finding of the Federal Court and enter non-objection?

A On the basis of that deferral.

Q On the basis of that deferral.

A That's correct.

Q And that is the only case that—

A That's right.

Q —in which that ever occurred?

A That's correct. To my knowledge, that is; and of course I wasn't associated with the program in the early —mid-'60's. I mean thereafter, after the Voting Rights Act.

Q But since October of '69,—
A That's right.

* * * *

[35] We—and when I say we, I mean the Department of Justice—in the administration of Section 5, is essence acting as surrogate of the court here in the District of Columbia. That court has ruled—

Q My question—my question, Mr. Jones, my question is, on what date—I am simply asking for a date; and at what date did the department consider that period to have begun to run?

A What I am trying to say is that we indicated our position on that question before the court. The court—

* * * *

[36] Q I am not asking you, Mr. Jones, either to agree or disagree with the courts.

A We—

Q And I understand what you are saying. But I am simply asking you as a factual matter when did that period begin to run as far as your department was concerned in 1972?

MR. DERFNER: Yes, but I object to that; because when you say "as a factual matter," that is a deceptively simple phrase. It is not a factual matter entirely; it is a factual and legal matter.

You can ask obviously what position did the department take in litigation when the issue arose; but I don't think you can—the court has concluded it and I don't think it is proper to go beyond that, to go beyond those statements that are on the record as far as litigation which is—

* * * *

[37] Q Do you understand my question, Mr. Jones?

A Yes; I do.

Q Could you answer it, please?

A At the time of litigation of Harper back in '72, the Department of Justice represented to the court what our position was. As a matter of fact, we represented to the court that in our view, the 60-day period had expired by the time the litigation was initiated.

* * * *

[38] Q Now, with respect to Act 1205, was the date which the department determined the 60-day period had begun to run May 12 of 1972?

A As I indicated before, we took the position in the District Court in this litigation in the Harper litigation that the the submission of Act 1205 was complete on the date we initially received it.

Q And with respect to Act 1204; that is, the statewide numbered seats for local offices, did the department consider the 60-day period to that submission to begin on a different date than May 12, 1972?

A According to Exhibit 8, which is a copy of the notice on the receipt of Act 1204, that Act was received on May 30, which is a date different from the date that we received the [39] Act 1205.

Q So the period for that Act, as far as the department was concerned, began to run on May 30th?

A No; it did not.

Q And why did it not begin to run on May 30th? Was that because you needed additional information before that submission was considered complete?

A That is correct.

Q And this would be additional information that is requested in the letter marked as Defendant's Exhibit No. 6?

A Defendant's Exhibit No. 6 is a copy of our letter requesting additional information with respect to Act 1204.

Q And that is the same additional information which is acknowledged as having been received in Defendant's Exhibit No. 7, the letter of June 19th?

A That is correct.

Q So only when you had received that additional information respecting Act 1204 did you consider the 60-day period to begin to run for that submission?

A That is normal procedure; yes.

Q And that procedure would be stated in the regulation?

A That is correct.

Q Mr. Jones, let's look one minute at Defendant's Exhibit No. 9, which is a letter of June 30th to the Attorney General of South Carolina from the Assistant Attorney General [40] for the Civil Rights Division.

A Um-hmm.

Q Is that letter, Defendant's Exhibit No. 9, a response to the submission of Act 1205 and a response to the submission of Act 1204; that is, is it a response to both of those submissions?

A Yes; it is.

Q Is it unusual or uncommon for the Attorney General to respond to more than one submission in the same letter?

A It is not routinely done; no.

Q But it is done?

A On occasion; yes.

* * * *

Where you have different submissions, is it not the case that you will respond to those submissions, even though they are different submissions, in one letter?

[41] A We have done that; yes.

Q And this is not an unusual procedure?

A Well, it is unusual in the sense that it is not done very often.

* * * *

[42] Q Act 1204 and 1205 were not submitted under cover of one letter; is that correct?

A That's correct.

[43] Q In that case, that would be considered as two separate submissions?

A That's correct; yes.

Q And the response to those two separate submissions is contained in one letter; namely, the letter of June 30, 1972?

A That's correct.

* * * *

[44] Q To your knowledge, did the Voting Rights section receive other supporting data which is not reflected in the summaries contained in these two exhibits with respect to submission of Act 932 of 1971 and Act 1205 of 1972?

A I don't personally recall. And this list was prepared from what is contained in our files now.

Q Your correspondence?

A That's correct.

Q Do you recall if Mr. Robert Rush was the attorney principally in charge of the submission in the South Carolina reapportionment plan at that time?

A He was in charge of our evaluation of it; yes.

Q So he would have been the person normally who would have requested any additional information and would have been the person who would have seen that rather than yourself?

A That's correct.

For a bit of clarification, he would not have requested the additional information. That form goes out from the Assitant Attorney General's office. But he would have initiated the request.

Q Is it sometimes the practice of attorneys within the Voting Rights section simply to make informal telephone calls and request information that way?

[45] A That's correct.

Q Is is possible that Mr. Rush might have done that?
A That is possible.

* * * *

And I would like to ask this question again just for clarification.

To your knowledge is the only case in which the Attorney General has entered a non-objection to a change submitted under the Voting Rights Act on the basis of referral to a Federal court, which would be the case of Act 1205, the South Carolina Senate reapportinment?

A That's correct.

* * * *

[48] Q I would refer you to Paragraph No. 10, which is on Page 3. This is some information which your staff is still compiling, which I would like, in the interest of avoiding having to come back and ask you this question at some later time, to ask you at this point if any of the information referred to in Paragraph 10 was placed in evidence in the case of Harper against Levi?

A No; not that I recall; no.

* * * *

CROSS EXAMINATION

* * * *

BY MR. DERFNER:

[50] Q And to your knowledge, did the department receive very many submissions before 1969?

A No, not many at all compared to what we have received since.

Q And is it fair to say that the submissions started coming in after the Allen case and then were really—started coming in in big volume after the Parkins case of '71?

A The big increase we noticed in 1971.

Q And it was in '71, as you said, that you formulated the—or promulgated the regulations governing your procedures?

A That's correct.

* * * *

[51] Has it been the policy or practice of the voting section or the personnel of the voting section handling specific submissions, to engage in frequent telephone conversations concerning those submissions?

A Telephone conversations outside the department?
Q Yes.
A Yes.

Q And those conversations would be sometimes with representatives of the submitting jurisdictions, such as the lawyer for the county or city or state or whatever, or official of that—

A That's correct.
Q —of that submitting jurisdiction.

And those conversations would be to gain further information or further insights on the information that was already—

A Clarification or something of that sort; yes.
Q Okay.

And that also sometimes included obtaining additional information by phone?

A That's correct.

MR. BELL: If I might interrupt at this point, are we talking now about after 1969, October '69, or before?

MR. DERFNER: Well, I am talking about after '69,

* * * *

[52] Q And have there also been telephone conversations of that sort with other people residing in or knowing about the situation in the submitting jurisdiction, to gain further information?

A Yes.

Q And this is when you referred to talking to community leaders or people familiar with the situation or in that area?

A That's correct.

* * * *

[53] Q Apart from this response, or from this particular decision involving South Carolina and these numbered seats, is it unusual for the department to deal with matters that are considered separate submissions in the same letter and in the same discussion?

MR. BELL: I am not sure what is meant by "discussion."

MR. DERFNER: Okay.

THE WITNESS: I am afraid I am not clear on what you are asking me, either.

MR. DERFNER: Okay.

BY MR. DERFNER:

Q When you have separate submissions—I think you said that you ordinarily dealt with them in separate letters—this technique of using—used in this letter, of dealing with the 1204 and 1205 together and, in fact, dealing with Section 3 of 1205 and Act 1204 in the same set of paragraphs—

A Oh; I understand.

* * * *

[54] A Well, it is unusual in the sense that I don't recall during my experience with Section 5 ever having run into a situation like this before where we had two simultaneous submissions involving the same issues, and the issue raised by the numbered post provision in Section 3 were essentially the same as the issue raised by Section—I mean Act 1204. So the reasoning supported both decisions.

* * * *

RE-DIRECT EXAMINATION

* * * *

BY MR. BELL:

[56] Q Mr. Jones, I have here a document, actually a paperback pamphlet, entitled "Extension of the Voting Rights Act, Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee of the Judiciary, House of Representatives, 94th Congress, First Session, on H. R. 939, H. R. 2143, [57] H. R. 3247, and H. R. 3501, Extension of the Voting Rights Act." This is Serial No. 1, Part 2. I would like to turn to Appendix 3, which is entitled Federal Review of Voting Changes: How to Use Section 5 of the Voting Rights Act, by David H. Hunter, Joint Center for Political Studies, Voter Education Project, Lawyers Committee for Civil Rights Under Law." And specifically, at Page 1523 of the hearing record, which is Page 51 of this Appendix 3, there is a paragraph entitled: The Sixty-Day period; and I am now handing you this House hearings.

Would you kindly read that into the record for me, read it aloud, that one paragraph?

A "The Sixty-Day Period.

"If the Attorney General decides to object he must do so within 60 days of receiving the submission. Until the 60 days have passed, the new practice or procedure cannot be implemented by the submitting jurisdiction. If the 60 days pass and the Attorney General has taken no action or has not objected, the change can be put into effect.

"Under the department's regulations, the 60 days do not begin until it has received a complete submission; that is, until the department has received all the information it considers necessary to making a determination of whether the change is discriminatory or not.

"Furthermore, the 60 days begins when the Attorney [58] General sees the submission, not when it is mailed by the submitting jurisdiction.

"The 60-day requirement is met if the department mails out its objection on the 60th day, even if it is received several days later.

"Finally, if the 60th day falls on a weekend or a holiday, the department has until the next working day to make its objection."

Q Now, if you would like to keep that in front of you, I would like to ask you a question or two about that.

First of all, do you understand what is being said there? If not, I will give you a moment to just review that and let it sink in.

A I think I understand.

Q Could you tell me whether that is an accurate statement of the policy as administered by—the policy and practice of the Voting Rights section concerning the 60-day period?

MR. DERFNER: I will wait until you finish. I want to make an objection to the question.

BY MR. BELL:

Q In your opinion, Mr. Jones, is that an accurate statement of the policy or practice followed by the Voting Rights section concerning Section 5 submissions?

MR. DERFNER: Okay. I object to the relevance. It calls for a legal conclusion; it is not clear whether the—[59] well, an objection as to the form—that it is not clear to me from the question whether Mr. Jones was asked for his view on whether this is an accurate reflection of the law in general or the law as it applies to a particular case such as this case or any other case.

BY MR. BELL:

Q Mr. Jones, my question, noting Mr. Derfner's objection, my question is whether that statement in your opinion is an accurate statement, statement of the policy in fact that is followed by the Voting Rights section, concerning Section 5 submissions. I am not asking you

to draw legal conclusions. I am just asking you if that is a correct statement of your practice and policy in administering Section 5.

A That is a correct statement of the general practice of the voting section in administering section 5 and is, as outlined in the Administrative Procedures for the administration of Section 5.

* * * *

RE-CROSS EXAMINATION

* * * *

BY MR. DERFNER:

[63] Q And is it true—and would you read, in Exhibit—the attachment to Exhibit 10; that is, the filing of the department's memorandum of July 16, 1973, Page 6.

Would you read the second full paragraph?

A Yes.

Q The second full paragraph, beginning with, "In view".

A You want me to read it aloud, or—

Q Just read the whole paragraph.

A Aloud?

Q Yes.

A Oh.

"In view of these facts, we were and still are compelled to conclude that Act No. 1205 has a clear and substantial racial effect in contravention of the 15th Amendment and its protections under Section 5 of the Voting Rights Act. Indeed, the reasons for finding a contravention of the 15th Amendment in the first set of Senate plans submitted (Act No. [64] 932) as we did in our objection letter of March 6, 1972, are also present upon reviewing the existing Act in question (Act No. 1205)."

* * * *

DIRECT EXAMINATION

* * * *

BY MR. BELL:

[6] Q Were you familiar with the practices, procedures and policies of the Civil Rights Division in connection with Section 5 enforcement during that period?

A I am sure I was at the time. I don't know that I could reconstruct them in any detail at this time.

Q Let me ask you some specific questions and see if you can recall.

Do you recall whether it was the practice in Section 5 enforcement at that time to object to a submission on the basis that the submitting jurisdiction had not carried its burden of proof in showing that the change being submitted would not have a discriminatory effect on minority voters? In other words, was the standard followed at that time in the department to place the burden of proof on the submitting jurisdiction with respect to the facts of a change?

A Well, I don't have a specific recollection that we had a guideline of that type in dealing with burden of proof. I do know that the whole thrust of the Voting Rights Act was to shift the burden of proof from private individuals to the states which sought changes.

* * * *

[7] Q Would it be incorrect to say that the—in Section 5 enforcement, the Civil Rights Division interposed objections only if it found affirmative evidence that the change would have a discriminatory effect?

MR. DERFNER: During what period?

MR. BELL: This is during the period '65 to '67. Still with respect to the jurisdictions that Mr. Turner had responsibility for, Mississippi and Louisiana.

MR. DERFNER: I think I am going to object to that, too, on the lack of foundation; because I am not sure

that it has been established that there were any objections during that period to submissions from those two states.

BY MR. BELL:

Q Do you recall if there were any objections to submissions from those two states during the period '65 to '67, Mr. Turner?

A No; I don't recall. I am sure the record would reflect it, and had I known you wanted that kind of information, I would have been prepared to have it for you.

Q In fact, for the record, we did request information which would have shown us that, and it was not available by the date of this deposition today. That information would be supplied. But that information was requested—not from you, Mr. Turner, but from Mr. Jones.

A Whatever the record shows.

[8] Q Do you recall whether there were any great number of objections to changes in voting procedures in those two jurisdictions during the period '65 to '67?

A My recollection is that there were not.

Q And do you have an explanation for why there were few objections during that period?

A Almost all of our resources at that time were concerned with enforcing other portions of the Voting Rights Act. 1966 was the first elections in which the Voting Rights Act was applied to the southern states; we had major elections that year in Alabama; in 1967 we had major elections in Mississippi; we had elections in 1966 in Louisiana; virtually all of the time and resources the Division had across the board were consumed in designating counties for examiners, servicing those examiners, setting up forms for examiners and observers to use, instructing observers, selecting places where observers were to go. It was pretty much a year-round project.

During that period, Section 5 just did not get any significant attention.

Q And when you refer to "the Division," you are speaking of the Civil Rights Division?

A Yes.

* * * *

[13] THE WITNESS: Well, let me say that, without talking about specific drafts, that we did change the approach from one which was essentially where we set out to find out whether or not there was discrimination, to one where the state was imposed, or the submitting authority was required to present that and to prove the essence [absence] of discrimination.

There was contention made on both sides; and in the regulatory—regulation-making process, we considered all manner of views, and finally concluded that the guidelines in final form adequately and accurately represented the Congressional will, and properly interpreted the law.

Q So there was a shift which was reflected in the guidelines as actually covered? Is that what you are saying?

A That is right. We had considered other alternatives, [14] rejected them in favor of this one, which we thought was the right guideline to have.

* * * *

[15] Q Would it be accurate to say that prior to the subject date of the new procedures that came out of this process you described, that objection was interposed only in [16] those cases where the Department had reached the conclusion that the effect of the change would in some way be to abridge or deny the voting rights of minorities?

A I think that is generally accurate.

Q And would it be accurate to say that under the procedures as they now exist and have existed since September '71 that the Attorney General may and in fact has interposed objections where the submitting authority

has not demonstrated the absence of a discriminatory effect?

A Well, whatever the guidelines say. I am not sure they are in that precise language.

Q But is—

A I think we have followed the guidelines and the sense that they were issued.

Q I am not sure that the guidelines speak directly to that question. So let me ask it again.

Is it accurate to say that the Attorney General has interposed objections to changes in cases where, in the judgment of the Attorney General, the submitting authority had now shown that the change would not have a discriminatory effect?

A Well, I am sure that has happened. The nearest that I can come to a categorical answer is to say that the language of the guidelines which is in terms of burden of proof has been followed consistently since they were issued.

[17] Q And have objections been based on that standard contained in the guidelines? That is what I am asking, the guidelines, really, the guidelines will not tell us whether objections have been interposed; and that is the thrust of my question.

A You will excuse me if I read—

Q Certainly. Take as much time as you need.

(Short pause.)

A The guidelines state that if the Attorney General determines that the submitted change has a racially discriminatory purpose of [or] effect, he will enter an objection and will so notify the submitting authority. If the evidence as to purpose or effect of the change is conflicting and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof, applicable in the District Court, enter an objection and so notify the submitting authority.

Q Now, my question is—

A And both of those areas, both of those conditions, we have entered objections since the guidelines became effective.

* * * *

EXHIBITS TO DEPOSITIONS

Exhibit No. 9 of Deposition of Gerald W. Jones Deposition—Letter of June 30, 1972 from David L. Norman to Daniel R. McLeod

June 30, 1972

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear General McLeod:

This is in reference to your submission of Acts 1204 and 1205 to the Attorney General pursuant to the provisions of Section 5 of the Voting Rights Act of 1965. Act 1205 provides for a new reapportionment plan for the State Senate and extends the numbered post requirement to all multi-member districts in the House of Representatives. Act 1204 provides for the use of numbered posts in all multi-member bodies in the state. Because some of the provisions are similar and you have sought expedited consideration of both submissions to meet election schedules, this letter deals with both statutes.

Senate Plan

Act 1205 was adopted on May 5, 1972 after the three-judge district court in *Twiggs, et al.* v. *West, et al.* (D.C., S.C., Nos. 71-1106, 71-1123, 71-1211) ruled that a prior senate reapportionment (Act 932) deviated from the one-man, one-vote principle and contained an impermissible residency requirement. In one of the cases considered in that proceeding, plaintiffs also invoked the court's jurisdiction under the Fifteenth Amendment, claiming that multi-member senate districts and the numbered seat re-

quirement illegally diluted minority voting strength. In its opinion of April 7, 1972, the court considered and rejected these contentions. As you are also aware, on March 6, 1972, prior to the above opinion, we entered an objection to Act 932 which you had submitted under Section 5 of the Voting Rights Act. The view expressed in our letter was that under existing precedents we were unable to conclude that the combination of multi-member districts, numbered posts and majority run-off would not dilute and abridge the voting strength of racial minorities. Senate reapportionment Plan A of Act 1205 was considered and approved by the three-judge court on May 23, 1972 with the court finding specifically that Plan A "complies with the requirements of the Constitution of the United States, and it is therefore approved."

Our only function under Section 5 of the Voting Rights Act is to review submitted acts for Fifteenth Amendment compliance as nearly as possible in the same manner that the District Court for the District of Columbia would had the act been presented there as the subject of a declaratory judgment action. Under this standard, we feel constrained to defer to the above determination of the three-judge District Court. The District Court unquestionably had jurisdiction to consider the issues presented to it under both the Fourteenth and Fifteenth Amendments, and it has specifically found Plan A to be constitutional. Parties who feel aggrieved by its decision have full right to seek appellate review. It would in our view not be appropriate to read the Voting Rights Act as requiring or permitting the Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction. For this reason, we enter no objection to the implementation of Plan A of Act 1205.

Numbered Seats

Section 3 of the Act 1205 and Act 1204 extend the requirement of running for numbered posts to all multi-member boards, commissions and other elective offices in the state, including the House of Representatives. In *Johnson* v. *West* (No. 72-680), the same three-judge court was requested to enjoin implementation of these acts until they had been submitted under Section 5 of the Voting Rights Act. On June 14, 1972, the court entered such an order and specifically found that these provisions had never been ruled upon by the court. Unlike the situation with respect to the State reapportionment plan, we review these acts without any prior judicial determination of constitutional validity or invalidity and with the burden of proof being on the submitting authority to show that the acts do not have the proscribed racial effect.

We have previously reviewed with you the various legal precedents indicating that the use of numbered seats and majority run-off requirements in multi-member electoral jurisdictions may impermissibly dilute the voting strength of cognizable racial minorities. (See our letter of March 6, 1972.) The question is whether we can certify that South Carolina's extension of the numbered seat requirement to virtually every multi-member office in the state does not have the dilutive effect described in those authorities.

According to information you furnished in connection with this submission, in addition to the House of Representatives, these requirements would apply to most of the state's school boards, county councils and municipal governing bodies. Many of these electorates contain cognizable racial minorities and we are unable to conclude that the racially dilutive effect some courts have described would not be occasioned by the numbered seat requirement.

For the above reasons, we must enter an objection on behalf of the Attorney General to the implementation of Act 1204 and Section 3 of Act 1205. As the Voting Rights Act provides, you may seek approval of these statutes in the District Court for the District of Columbia notwithstanding this objection.

Sincerely,

/s/ DAVID L. NORMAN,
Assistant Attorney General,
Civil Rights Division.

Exhibit No. 10 of Deposition of Gerald W. Jones—Letter of July 20, 1973 from J. Stanley Pottinger to Daniel R. McLeod.

July 20, 1973

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Mr. Attorney General:

This is in reference to Act No. 1205 reapportioning the South Carolina Senate districts which was originally submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, on May 9, 1972.

On June 30, 1972 we notified you that no objection would be interposed to the senate redistricting because the Attorney General was "constrained to defer" to a determination made on May 23, 1972 by the three-judge court in *Twiggs, et al.* v. *West, et al.* (D. S. C. Nos. 71-1106, 71-1123, 71-1211). The Attorney General's decision not to object was subsequently challenged in the District Court for the District of Columbia, *Harper, et al.* v. *Richardson, et al.* (C. A. No. 1607-72). On August 11, 1972 the District Court entered an order suspending the 60-day period within which the Attorney General may enter an objection to changes submitted to him pursuant to Section 5. On May 16, 1973 the Court ordered the matter "remanded to the Attorney General of the United States for a reasoned decision in accordance with his statutory responsibilities" and required him to report to the Court within 60 days. Notice of appeal to the Court of Appeals for the District of Columbia was filed. Stay applications were denied in the District Court on June 11, 1973 and in the Circuit Court on July 13, 1973.

On July 16, 1973, in response to the Court's order, the Attorney General filed a decision based on a reconsideration of Act No. 1205, again deferring to the decision of the three-judge court in the *Twiggs* case. This opinion indicated that but for the decision in *Twiggs*, the Attorney General would have objected to the Senate plan. On July 19, the District Court ordered the Attorney General to consider the Senate plan "without regard to the decision of the Three Judge District Court in *Twiggs* v. *West*." Copies of the orders of the District Court and the Attorney General's decision of July 16, 1973 are enclosed for your information.

Pursuant to the Order of July 19, 1973 and for the reasons set forth in the Attorney General's decision of July 16, 1973 and in our March 6, 1972 letter objecting to Act 932, an earlier Senate plan, I am unable to conclude that Act No. 1205 does not have the effect of abridging voting rights on account of race. Therefore, on behalf of the Attorney General, I must interpose an objection to the implementation of the election procedure set forth in that statute.

Of course, as provided for by Section 5, you may institute an action in the District Court for the District of Columbia for a declaratory judgment that Act 1205 does not have the purpose and will not have the effect of abridging the right to vote on account of race, notwithstanding this objection.

Sincerely,

/s/ J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

STIPULATIONS

Filed Jan. 26, 1976

[Caption Omitted in Printing]

The parties to the above captioned action hereby agree and stipulate as follows:

1. That on or before July 11, 1972, the only communication from the United States Attorney General to the State of South Carolina conveying a decision to object or not to object to Section 2 of Act 1205 of 1972 was a letter dated June 30, 1975, from David L. Norman, Assistant Attorney General, Civil Rights Division, United States Department of Justice to Daniel R. McLeod, Attorney General of South Carolina.

2. That on or about July 1, 1972, the State of South Carolina began implementing Plan A of Act 1205 of 1972 and that Plan A was the basis upon which primary and general elections for the South Carolina Senate were conducted in August, September and November of 1972.

3. That the State of South Carolina has continuously enforced Plan A of Act 1205 of 1972 from a date on or about July 1, 1972, until the present.

4. That the 1973, 1974 and 1975 regular sessions and the 1973 special session of the General Assembly of South Carolina and its 1976 regular session to date have all been conducted on the basis of the Senate apportionment in Plan A of Act 1205 of 1972.

5. That from July 1, 1972, until the filing of this action on November 7, 1975, neither the plaintiffs in this action nor any other citizen of South Carolina commenced any legal action seeking an injunction or other relief against the enforcement of Plan A of Act 1205 of 1972, either on the ground that the State of South Carolina had

no authority to enforce Plan A under Section of the Voting Rights Act of 1965 or on any other grounds.

6. That the plaintiffs John Roy Harper II and Victoria DeLee in *Harper* v. *Kleindienst*, Civil Action No. 1607-72 (D. D. C. filed August 10, 1972) are the same persons as the plaintiffs John Roy Harper II and Victoria DeLee in *McCollum* v. *West*, Civil Action No. 71-1211 (D. S. C. filed December 7, 1971).

7. That on July 21, 1972, the plaintiffs in *McCollum* v. *West*, Civil Action No. 71-1211 (D. S. C. filed December 7, 1971) filed Notice of Appeal to the United States Supreme Court from the orders of May 23d, 1972, and June 9th, 1972, in that action; that on September 19, 1972, the aforesaid plaintiffs were granted an extension of time within which to docket the appeal by the United States Supreme Court; that the time within which to docket the appeal was extended to November 21, 1972, a date after the commencement of action in *Harper* v. *Kleindienst*, Civil Action No. 1607-72 (D. D. C. August 10, 1972); that the aforesaid plaintiffs did not perfect the appeal in *McCollum* v. *West*.

8. That the plaintiffs in *McCollum* v. *West*, Civil Action No. 71-1211 (D. S. C. filed December 7, 1971) purported to maintain a class action on behalf of, *inter alia*, black residents in Charleston County, South Carolina; that the plaintiffs in the instant action were then and are now black residents in Charleston County, South Carolina.

9. That the parties to the instant action stipulate to the introduction into the record in this action of the deposition of James H. Quackenbush, Jr., taken in the case of *Stevenson* v. *West*, Civil Action No. 72-45 (D. S. C. filed 1972).

10. That the South Carolina House of Representatives was reapportioned into single-member districts in

1974 following the objection of the United States Attorney General to implementation of a prior reapportionment plan contained in Act No. 836 of 1973; that on or about February 14, 1974, the United States Attorney General interposed objection to Act No. 836 of 1973; that on or about February 28, 1974, H2274, a bill reapportioning the House of Representatives into single-member districts was reported to the floor of the House by the House Judiciary Committee; that on or about March 12, 1974, H2274, as amended, passed the House of Representatives; that on or about April 10, 1974, H2274, as further amended passed the Senate; that on or about April 24, 1974, H2274, as further amended, was reported to the floors of both chambers by a joint free conference committee; that on or about April 24, 1974, the House ratified the joint free conference report; that on or about April 26, 1974, the Senate ratified the joint free conference report; that on or about April 26, 1974, H2274, as ratified, was signed into law by the Governor as Act No. 991 of 1974; that on or about April 26, 1974, Act No. 991 of 1974, was submitted to the United States Attorney General for review under Section 5 of the Voting Rights Act of 1965; that on or about June 21, 1974, the United States Attorney General notified the State of South Carolina that he would interpose no objection to Act No. 991 of 1974.

11. That on or about August 14, 1972, the State of South Carolina received notice of the order of August 11, 1972, of the United States District Court in *Harper* v. *Kleindienst*, Civil Action No. 1607-72 (D. D. C. filed August 10, 1972).

12. That the information contained in the first, second, third, seventh, eighth, and ninth paragraphs of an article entitled "Senate Plans Remap Suit," appearing on page one of *The State* newspaper, Columbia, South Carolina, on November 6, 1975, is substantially accurate.

13. That the parties to the instant action stipulate to the introduction into the record in this action of transcripts of the meetings of the Special Senate Reapportionment Committee held on June 3, July 29, August 11 and October 30, 1975.

/s/ RANDALL T. BELL
Attorney for Defendants

/s/ ARMAND DERFNER
Attorney for Plaintiffs

January 26, 1976.

PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

Filed March 22, 1976

[Caption Omitted in Printing]

Pursuant to Rule 59(e), Fed. R. Civ. P., plaintiffs move to alter or amend the judgment of this Court entered March 12, 1976, denying their prayer for an injunction against the enforcement of Act 1205, Acts of the General Assembly of 1972, and dismissing their complaint. This motion is based on the following grounds:

1. There was and is an outstanding decision of the Attorney General of the United States, entered pursuant to section 5 of the Voting Rights Act, objecting to Act 1205. That objection was entered in conformity with a decree of a court of competent jurisdiction which (a) found that the 60-day period for objecting had not run when it assumed jurisdiction and tolled the time for objecting, (b) that the Attorney General's initial decision not to object was reviewable, and (c) that the Attorney General's initial decision was erroneous as a matter of law. *Harper* v. *Kleindienst*, 362 F. Supp. 742 (D.D.C. 1973), *aff'd Harper* v. *Levi*, 520 F.2d 53 (D.C. Cir. 1975). That decision has become final.

The Attorney General's decision, entered as it was pursuant to a lawful, final order of a court of competent jurisdiction, was entitled to "full faith and credit," and the decision in *Harper* was entitled to be followed under the doctrines of stare decisis and comity.

These doctrines are not discussed in this Court's opinion of March 12. The opinion does address one case relied on by plaintiffs, *Penn Central and N & W Inclusion Cases*, 389 U.S. 486 (1969), but reads the case to mean only the the Supreme Court's holding forecloses further litigation by non-parties, under the traditional doctrine

that lower courts are bound by holdings of appellate courts. If that were the meaning of *Penn Central*, though, only the lower courts would be foreclosed from considering arguments pressed by litigants who passed up opportunities to participate in the earlier stages of the litigation. The Supreme Court's opinion makes it clear, however, that those non-parties are foreclosed not only from re-litigating below, but that they are foreclosed from raising the matters in the Supreme Court itself.

2. In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the Supreme Court held that agency action should be found to be reviewable in the absence of the absolutely clearest indication that Congress meant otherwise. Moreover, the Supreme Court in that case made it clear that the mere presence of a detailed statutory scheme of remedies, some of which were explicitly made reviewable, was not enough to preclude review of other types of agency action.

This Court holds that *Abbott Laboratories* is inapplicable here, chiefly because (a) the Attorney General's no-objection did not adjudicate any voter's substantial rights, and (b) Congress' concern with delay in the judicial process shows that it intended to insulate the Attorney General's no-objections from judicial review. Plaintiffs submit that these views arise from a misreading of the basic purposes of the Voting Rights Act.

First, the Court holds that the Attorney General's no-objection does not adjudicate any voter's substantial rights because voters still have an adequate remedy in a traditional fifteenth amendment case. But the Voting Rights Act was passed precisely because traditional fifteenth amendment remedies which depend upon judicial enforcement had been found by Congress to be inadequate, even after repeated attempts to streamline such litigation in the Civil Rights Acts of 1957, 1960,

and 1964. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 327-28 (1966).

In the face of this history, there is no basis for dismissing the section 5 remedy as one which has "no binding legal consequence." Slip op. p. 13 or for holding that voters were not "adversely affected" by the Attorney General's no-objection, Slip op. p. 16.

Secondly, the March 12 opinion finds "compelling" reason to believe that Congress intended to insulate the Attorney General's decisions from judicial review. This reading of the purpose of section 5 is based upon passages of the legislative history which make it abundantly clear that the overriding purposes of Congress was to do away with judicial delays confronting voters challenging state enactments, not delays confronting states. See, *e.g.*, H.R.Rep. No. 439, 89th Cong., 1st Sess. 38 (1965) (cited at Slip Op. p.18n.26):

> "[A]s this Committee has returned to consideration of voting rights, there is consensus that a departure from traditional legislative method must be made, and a wholly new approach embraced; the burden of inherent delay and inertia of court process must be shifted to those who would withhold the right to vote." *

3. Since the filing of the parties' briefs in this case, the Supreme Court has decided the case of *East Carroll Parish* v. *Marshall*, —— U.S. —— (March 8, 1976). That case raises the question whether Act 1205 required Voting Rights Act preclearance at all. For the reasons set forth in the footnote,** plaintiffs believe that section

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* Likewise, the testimony of Attorney General Katzenbach, Slip Op. pp. 18-19, obviously refers to delay encountered by voters challenging State enactments, and the consequent frustration of purpose of the federal laws and Constitutional provisions guaranteeing the right to vote.

** Defendants have never argued that Act 1205 was not covered by section 5 of the Voting Rights Act. Such an argument would be

5 preclearance was required and that *East Carroll Parish* does not change the matter. If, however, it is held that Act 1205 comes within the court decree exception to section 5, then *East Carroll Parish* makes it plain that the use of multi-member districts in Act 1205 is beyond a court's discretion and that single-member districts are required. *East Carroll Parish* holds that in the absence of exceptional circumstances a district court adopting a plan should use single-member districts. The mere fact that a prior legislatively drawn plan used multi-member districts is not a special circumstance, *Connor* v. *Johnson*, 402 U.S. 690 (1971), especially where there has been a section 5 objection to the use of multi-member districts. Since no finding of exceptional circumstances has been made nor could be made in this case, a holding that section 5 preclearance was not required here would simply furnish an additional reason for requiring single-

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unavailing in any event. It is true that South Carolina, like East Carroll Parish, was barred under the Voting Rights Act from drawing a plan with multi-member districts, and that this Court on June 9, 1972, described Act 1205 in terms approaching those of a court plan. East Carroll Parish, however, focuses on "court-ordered plans resulting from equitable jurisdiction over adversary proceedings." Slip Op. p. 3 n.6. Act 1205 fails this description in two ways. First, the suit which resulted in the court order was a friendly suit. It was filed by the Attorney General of South Carolina on the day the predecessor Senate plan (Act 932) was passed, pursuant to a Concurrent Resolution of the General Assembly (S. 671) adopted by the South Carolina General Assembly two days earlier. That other parties may have entered the litigation, to seek to protect their interests, does not change the character of the suit. Secondly, the court order which advised the General Assembly that it need not comply with the Attorney General's section 5 objection was inappropriate, in light of Connor v. Waller, 44 L. Ed. 2d 486 (1975). If a suit of this sort, resulting in such an order, could defeat section 5 jurisdiction, the way would be open for any jurisdiction covered by the Voting Rights Act to defeat the basic purpose of Congress. *Compare* Georgia v. United States, 411 U.S. 526, 538 (1973).

member districts in the South Carolina Senate apportionment.*

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in plaintiffs' earlier memorandum, plaintiffs pray that this Court alter or amend the judgment entered March 12, 1976, by granting the relief prayed for in paragraph 17(c)-(g) of the complaint.

Respectfully submitted,

/s/ Armand Derfner
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* The order upholding Act 1205 is not insulated by the fact that it was entered four years ago. *See* Whitcomb v. Chavis, 403 U.S. 124, 162-63 (1971); Twiggs v. West, C.A. No. 71-1106, Order of June 9, 1972.

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